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NINTH REPORT ON THE DRAFT CODE OF CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

by

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INTRODUCTION

1. The eighth report of the Special Rapporteur completed the list of offences constituting crimes against the peace and security of mankind. 1/

2. The present report concerns a complementary aspect of the draft Code: consideration of the penalties applicable to these offences (part one).

3. It also concerns the question of the establishment of an international criminal jurisdiction (part two). This second part of the report is in response to paragraph 3 of General Assembly resolution 45/41 of 28 November 1990, in which the Assembly:

> "Invites the International Law Commission, as it continues its work on the elaboration of the draft Code of Crimes against the Peace and Security of Mankind, to consider further and analyse the issues raised in its report on the question of international criminal jurisdiction, including the possibility of establishing an international criminal court or other international criminal trial mechanism".

I. PART ONE - PENALTIES APPLICABLE TO CRIMES AGAINST THE PEACE AND SECURITY OF MANKIND

4. The principle nulla poena sine lege requires that provision be made for penalties in the draft Code. Such an undertaking, however, entails certain difficulties. Some difficulties arise from the diversity of legal systems; others are related to procedural problems.

1/ Note on the elimination of the tripartite division "crimes against peace", "crimes against humanity" and "war crimes": At a subsequent stage, presumably on second reading, the tripartite division of offences presented in the draft Code (crimes against peace, crimes against humanity and war crimes) should be eliminated so that they may be regrouped into the single category "Crimes against the peace and security of mankind". The Special Rapporteur had adopted this tripartite division on a purely provisional basis for the purpose of analysis. A section of his third report, entitled "Unity of the concept of offences against the peace and security of mankind" (A/CN.4/387, paras. 26 to 39), has already dealt with this question.

In his third report, the Special Rapporteur gave an account of the doctrinal debate on the unity and homogeneity of this concept, and concluded thus:

> "To sum up, the expression 'peace and security of mankind' has a certain unity, a certain comprehensiveness, linking the various offences. Although each offence has its own special characteristics, they all belong to the same category, and are marked by the same degree of extreme seriousness." (ibid., para. 38)

A. Diversity of legal systems

5. In domestic law, there exists within each State a certain unity among moral and philosophical concepts which justifies a single system of punishment applicable to all offences.

6. In international law, on the other hand, the diversity of concepts and philosophies is hardly conducive to a uniform system of punishment.

7. Certain sanctions which are current in some countries are unknown in others, as in the case of the death penalty, which has undergone varied fortunes historically and geographically. Some countries have successively abolished and reinstated it according to circumstances, often in response to the emotion aroused by specific criminal acts at a given time. Thus, the movement to abolish the death penalty has undergone varied fortunes according to country and point in time.

8. In France, the death penalty, which was limited at one point to certain crimes under ordinary law (murder, parricide, kidnapping and subsequent death of a minor, arson committed on inhabited premises, etc.), was no longer applicable to political offences except in the case of crimes against national security. The death penalty was not totally abolished until 1981.

9. In England, the first step was partial abolition of the death penalty. The abolition was then progressively extended until 1965, when the penalty was temporarily abolished for a five-year period pending a parliamentary vote on its definitive abolition, which occurred in 1970. Sweden had also partially abolished the death penalty in 1921, before opting for total abolition in 1972.

10. Germany and Switzerland abrogated the death penalty with no intermediate stage of partial abolition, in 1949 and 1937 respectively.

11. However, in those European countries which have abolished the death penalty, there have from time to time been calls for its reinstatement because of circumstances often related to the commission of crimes which have strongly influenced public opinion.

12. The death penalty still exists in all Eastern European countries. It also exists in all African and Asian countries and in 36 out of the 50 states comprising the United States of America. It does not, however, exist in Australia.

13. In addition to the death penalty, other penalties involving corporal punishment or personal restraint are also at issue, particularly those consisting of physical mutilation.

14. These brief observations on national legal provisions illustrate the difficulty of instituting, at the international level, a single, internationally and uniformly applicable system of penalties.

B. Procedural difficulties

15. The difficulties relating to the diversity of legal systems are compounded by procedural difficulties. Should a penalty be laid down for each crime against the peace and security of mankind? Or, considering that all of the crimes in question are marked by the same degree of extreme seriousness, should a general formula be adopted which sets forth the same penalty for all crimes against the peace and security of mankind, with a minimum and a maximum according to the presence or absence of extenuating circumstances?

1. The debate in the International Law Commission at its 1954 session

16. It should be noted that the 1954 draft Code did not lay down any penalties. This was not a case of negligence, but an intentional omission. A draft article 5 had been adopted by the Commission at its third session. 2/ According to this draft article:

> "The penalty for any offence defined in this Code shall be determined by the tribunal exercising jurisdiction over the individual accused, taking into account the gravity of the offence." 3/

17. This draft article was similar to article 27 of the Charter of the Nürnberg Tribunal 4/ in that it assigned to the judge the responsibility for determining the applicable penalty, but it nevertheless respected the principle nullum crimen sine lege, because the draft Code specified the crimes to which the penalties were applicable. It was, however, strongly criticized by the Governments which addressed comments to the Commission.

18. For example, the Government of Bolivia expressed the following opinion:

> "In deference to the generally accepted principle nulla poena sine lege it will be necessary to lay down in the code, in a separate article, that the competent tribunal will be authorized to impose the most adequate penalty,

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2/ See the report of the International Law Commission to the General Assembly on the work of its third session, chap. IV, para. 59, Yearbook ... 1951, vol. II, document A/1858, p. 137.

3/ The French text of draft article 5 appears in the third report of Mr. J. Spiropoulos, chap. XVI, sect. (a), Yearbook ... 1954, vol. II, document A/CN.4/85, p. 121.

4/ Article 27 of the Charter of the Nürnberg Tribunal reads as follows: "The Tribunal shall have the right to impose upon a Defendant, on conviction, death or such other punishment as shall be determined by it to be just" (A/CN.4/368, Part One, chap. B.1.a).

taking into consideration not only the gravity of the offence but also the personality of the offender." 5/

19. Apart from the reference to the personality of the offender, this proposal does not appear to differ from that of the Commission, as set forth above.

20. The view of the Government of Costa Rica was as follows:

"If this article [5] is allowed to stand as drafted, the code will be open to the same criticisms as were levelled against the Nürnberg Tribunal, which had to institute and apply penalties that had not been previously determined by any rule of positive law." 6/

And according to that Government, the principle nulla poena sine lege presupposed "a clear determination beforehand of the penalty applicable to each category of offence." 7/

21. In the opinion of the Egyptian Government, under draft article 5: "The power to determine the penalty for each offence is delegated to the competent court". It saw in that delegation of power a real danger, given that the judges' evaluation could be influenced by various circumstances not necessarily related to the law. It believed that it was preferable to try to establish an adequate penalty for each crime, with a minimum and maximum, if necessary. 8/

22. In the view of the Government of the United Kingdom of Great Britain and Northern Ireland, draft article 5 was completely inappropriate in the context of the draft Code. In so far as the various crimes mentioned in the Code constituted crimes or would be considered as such under the domestic legislation of various countries, it was for the legislatures of those countries to establish the penalty appropriate to each crime. In so far as the question of punishment and penalties to be imposed was governed by an international convention, it would be for the convention to prescribe the penalties to be imposed. In the view of that Government, it seemed more judicious to omit article 5. 9/

23. In the end, the Commission was deterred by the difficulties at hand, judging that it seemed inappropriate to address the question of penalties.

5/ See the third report of Mr. J. Spiropoulos (footnote 3 above), chap. XVI, sect. (b), "Comments by Governments".

6/ Ibid.

7/ Ibid.

8/ Ibid.

9/ Ibid.

2. The current situation

24. If the Commission takes the view that it is appropriate to return to the question of penalties, it should be aware of the fact that two paths are open to States for adoption of the Code, and that the solution of the problem of penalties depends on the path selected.

25. The first path would be to incorporate the provisions of the Code directly in domestic law and, at the same time, establish appropriate penalties. This solution could, of course, have the disadvantage of creating an imbalance by instituting different penalties for the same crime, especially between States where the death penalty has been abolished and those where it still exists, or between States which impose certain forms of corporal punishment - under Shariah for example - and those which do not.

26. The second path would be to include the penalties in the Code itself and to adopt it by means of an international convention. This solution would clearly be conducive to some uniformity in sentencing. The only problem would be to determine whether a separate penalty is to be provided for each crime in the Code, or whether a single penalty, applicable to all the crimes, would suffice.

27. The Special Rapporteur would favour the latter solution. In effect, crimes in the Code are, by reason of their extreme gravity, at the top of the hierarchy of international crimes, whether they be crimes against peace, crimes against humanity or even war crimes. Actually, as regards the latter, the Commission had included as crimes against the peace and security of mankind only the most serious war crimes.

C. Draft article Z on applicable penalties

28. In the light of the above considerations, the Special Rapporteur proposes a single draft article, covering all crimes against the peace and security of mankind.

1. Text of draft article Z proposed by the Special Rapporteur

29. The text proposed by the Special Rapporteur reads as follows:

> "Any defendant found guilty of any of the crimes defined in this Code shall be sentenced to life imprisonment.
>
> If there are extenuating circumstances, the defendant shall be sentenced to imprisonment for a term of 10 to 20 years.
>
> [In addition, the defendant may, as appropriate, be sentenced to total or partial confiscation of stolen or misappropriated property. The Tribunal shall decide whether to entrust such property to a humanitarian organization.]"

2. Commentary

First paragraph

30. Despite the reservations concerning life imprisonment voiced by those who believe that it makes rehabilitation and reintegration into society impossible, it is difficult to imagine how the maximum penalty for crimes such as those in question could be imprisonment for a definite period of time, a sentence sometimes imposed for ordinary offences. Inasmuch as the death penalty has been ruled out, it seems difficult to rule out life imprisonment as well.

Second paragraph

31. This paragraph, however, proposes an exception to the principle established in the first paragraph, in cases where pertinent extenuating circumstances make it more acceptable to impose a prison sentence for a definite period of time.

Third paragraph

32. This paragraph is in square brackets. It proposes a supplementary and optional penalty, already provided for in the Charter of the Nürnberg Tribunal. 10/

33. It must be noted, however, that other than for economic offences and threats to national security, this penalty is viewed with some disfavour, because it is felt that it punishes not only the convicted person, but sometimes his relatives (a spouse who has joint ownership of property, and heirs). It will be for the Commission to decide whether or not to include it.

34. Another problem raised by this supplementary penalty is that of deciding to whom the confiscated property will be awarded. In domestic law, it is generally given to the State. But the problem is more complex regarding international crimes referred to an international tribunal.

35. The Charter of the Nürnberg Tribunal had decided that property would be delivered "to the Control Council for Germany", the Allied body instituting the tribunals under law No. 10 to try war criminals other than the major criminals referred to the Nürnberg Tribunal.

36. In the present case, it will be up to the Commission, if it retains the provision regarding confiscation of property, to decide to which body confiscated property should be entrusted, perhaps, for example, the International Committee of the Red Cross (ICRC), the United Nations Children's Fund (UNICEF), or an international organization fighting illicit drug traffic.

10/ Article 28 of the Charter of the Nürnberg Tribunal reads as follows: "In addition to any punishment imposed by it the Tribunal shall have the right to deprive the convicted person of any stolen property and order its delivery to the Control Council for Germany" (A/CN.4/368, Part One, chap. B.1.a).